Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1996

IN THE MATTER OF:

PHIL KAUBLE

Plaintiff - Petitioner,

-v-

PENSION BENEFIT GUARANTY CORPORATION

Defendant - Respondent.

Petition for Writ of Certiorari

PHIL KAUBLE
Plaintiff - Petitioner
1024 South Mccann Street
Kokomo, Indiana 46902
Tel: (317) 452-6538

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53 pp

QUESTION PRESENTED FOR REVIEW

Can the Pension Benefit Guaranty Corporation as Plan administrator of a terminated pension plan deprive pension plan participants of pension benefits that accrued and were owed to plan participants prior to the plan termination date of the pension plan?

LIST OF PARTIES

Plaintiff - Petitioner:

Phil Kauble
1024 South McCann Street
Kokomo, Indiana 46902
Tel: (317) 452-6538

Defendant - Respondent:

Pension Benefit Guaranty
Corporation
1200 K Street, N.W.
Washington, D.C. 20005

TABLE OF CONTENTS

	Page
Question Presented For Review	i
List of Parties	ii
Table of Contents	iii
Table of Authorities	iv
Rules and Statutes	v
Opinions Below	1
Jurisdiction	2
Rules Involved	3 - 4
Statement of Case	5 - 10
Reasons Why This Petition For Writ Of Certiorari Should Be Granted	10 - 16
Precise Relief Requested	16 - 17

TABLE OF AUTHORITIES

Cases:	Page
Audio Fidelity Corp. v.Pension Benefit Guaranty Corp., 624 E.2d 513, 517 (4th Cir.-1980)	10
Blessitt v. Retirement Plan for Employees of Dixie Engine, 848 F.2d 1164 1172-1173 (11th Cir.-1988)	11
In Re: Braniff Airways, 24 Bankruptcy Reporter 466 (U.S. Bankruptcy Court Tex.-1982	10
Broadway Maintenance Corp., 707 F.2d 647, 649 (2nd Cir.-1983)	11, 13 15
In re: Maryland Glass, 618 F.Supp. 1410 - 1415, (D.C. Md.-1985)	11
Pension Benefit Guaranty Corp. v. Heppenstall, 633 F.2d 293 300-301 (3rd Cir.-1983)	10, 12 13, 15
Pension Commission for Farmstead v. PBGC, 778 F.Supp. 1020, 1026 - 1027 (D.C. Minn.-1991)	10

Rules and Statutes:	Page
28 U.S.C. §1252(1)	2
29 U.S.C. §1321	4
29 U.S.C. §1322(a)	3, 7, 8, 10, 14
29 U.S.C. §1345	12
29 U.S.C. §1348	4
Other Authorities:	
Fifth Amendment U.S. Constitution	3, 15
Section 3.1 of Pension Agreement	6
Section 10.8 of Pension Agreement	6

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is unreported and unpublished, which is reproduced in the Appendix attached hereto. The opinion of the United States District Court for the Southern District of Indiana referenced in the opinion of the Court of Appeals for the Seventh Circuit is reproduced in Appendix attached hereto and is hereafter referenced as "App._____".

JURISDICTION

The opinion of the Court of Appeals was decided on August 14, 1996. App.1. No petition for rehearing was filed. This petition for writ of certiorari is timely filed. The jurisdiction of this Court is invoked under 28 U.S.C. §1252(1).

RULES INVOLVED

The rules involved are:

Constitution of the United States - 5th Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 29 U.S.C. §1322(a): Subject to the limitations contained in subsection (b), the corporation shall guarantee the

payment of all nonforfeitable benefits (other than benefits becoming non-forfeitable solely on account of the termination of a plan) under the terms of the plan which terminates at a time when section 4021 [29 USCS §1321] applies to it.

Title 29 U.S.C. §1348: For purposes of this title the date of termination is -
(3) in the case of a plan termination in accordance with the provisions of either section in any case in which no agreement is reached between the plan administrator and the corporation (or the trustee), the date established by the court.

STATEMENT OF THE CASE

The Petitioners, Phil Kauble, et al, (hereinafter, "Kauble") were participants in Pension Plan A of Continental Steel Corporation. After the filing of bankruptcy by Continental Steel, the Pension Benefit Guaranty Corporation (hereinafter, "the PBGC") sought the termination of the pension plan and in March, 1986, the PBGC was appointed the statutory trustee of the pension plan.

In February, 1988, after heated litigation and numerous inquiries by members of Congress on behalf of plan participants for information from the PBGC on this matter, there was an agreement between the PBGC, the bankruptcy trustee and the participants' former union (purportedly representing plan participants) that the plan termination date of the pension plan was on February 25, 1986 and that the "shutdown" of the facility where the

plan participants worked was on or before February 24, 1986. In other words, the shutdown of the facility occurred before the date of plan termination. The bankruptcy court authorized the bankruptcy trustee to enter into the pension plan termination agreement in March, 1988.

Section 3.1 of the Pension Agreement defined two types of pension payments: (1) a special payment initial pension amount referred to as a "Special Payment" paid upon retirement, and (2) a regular pension amount payable in monthly installments. Section 10.8 of the Pension Agreement provided that upon shutdown of the facility, the plan participants were entitled to elect between layoff and retirement. In the case of Kauble, the only rational choice was retirement since electing layoff from a bankrupt employer would be a totally senseless move given the probative facts

and circumstances. Thus, the event of "shutdown" of the facility on or before February 24, 1986, triggered Kauble's right to a pension benefit payable from the Plan before the Plan was terminated on February 25, 1986 by the PBGC.

In July, 1992, again after much litigation and repeated attempts by members of Congress to get information from the PBGC concerning this matter, the PBGC notified plan participants of its final determination of pension benefit amounts that the plan participants would receive from the PBGC. The PBGC denied Kauble and 118 others identically situated their Special Payments upon retirement on grounds that it was not the type of pension benefit that was guaranteed by the PBGC pursuant to 29 U.S.C. §1322(a) and the rules promulgated thereunder. See, generally, App. 10, para 2, and App. 14-21.

Kauble and the other 118 others appealed the final decision to the U.S. District Court for the Southern District of Indiana. Kauble appealed the decision of the District Court to the U.S. Seventh Circuit Court of Appeals and now petitions the U.S. Supreme Court for Writ of Certiorari to issue to the Seventh Circuit Court of Appeals.

Kauble admits the fact that if his right to a Special Payment had occurred after the plan termination date it is not the type of pension benefit that is guaranteed by the PBGC pursuant to 29 U.S.C. §1322(a) and its progeny. However, Kauble has been consistent in the argument that his right to the Special Payment occurred <u>before</u> the Plan termination date pursuant to the Plan termination date agreement agreed to by the PBGC. Thus, the Special Payment is not subject to analysis as to whether or

not it is guaranteed by the PBGC pursuant to 29 U.S.C. §1322(a). The Special Payment is owed to Kauble as a pension benefit payable from the Plan prior to the Plan termination date.

PBGC and the District Court misread what Kauble "admitted" about the pension granted to the Local Union President. App. 26. Inasmuch, Kauble admits that the pension was "backdated" from sometime after February 13, 1986 to January 31, 1986, and that Collins did not "retire". Instead, Collins continued to work at full pay on the same job after receiving the backdated pension that included the Special Payment that PBGC says is not guaranteed for Kauble. In other words, Collins was granted a pension with Special Payment sometime after 2/13/86 but before 2/25/86. PBGC has no problem with this because the pension was granted before the Plan terminated. However,

PBGC argues disingenuously that the same pension with Special Payment is not the type guaranteed by the PBGC. PBGC guaranteed the Special Payment to Collins.

REASONS WHY THIS PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED

The legal effect of the plan termination date is that all benefits that accrued prior to the termination date are paid, while the benefits accruing after the termination date may or may not be guaranteed by the PBGC. Pension Benefit Guaranty Corp. v. Heppenstall, 633 F.2d 293, 300-301 (3rd Cir.-1980); Audio Fidelity Corp. v. Pension Benefit Guaranty Corp., 624 E.2d 513, 517 (4th Cir.-1980); In Re: Braniff Airways, 24 Bankruptcy Reporter 466 (U.S. Bankruptcy Court Tex.-1982). See, also, Pension Commission for Farmstead v. PBGC, 778 F.Supp. 1020, 1026 - 1027 (D.C. Minn.-

1991); Blessitt v. Retirement Plan for Employees of Dixie Engine, 848 F.2d 1164, 1172-1173 (11th Cir.-1988).

"A plan's termination date is significant ... [T]ermination marks the date on which benefits of plan participants cease to accrue. For voluntary termination, the date of termination serves an additional purpose. When an employer underfunds its pension plan and is unable to finance a minimum level of benefits, PBGC, pursuant to its statutory guarantee, must pay those benefit." Pension Benefit Guaranty Corp. v. Broadway Maintenance Corp., 707 F.2d 647, 649 (2nd Cir.-1983); See, In re: Maryland Glass, 618 F.Supp. 1410, 1412 - 1415, (D.C. Md.-1985).

"The termination date affects retirees only to the extent that the payments guaranteed under ERISA [may be] less than they are currently receiving, or to the

extent that benefits already received may be recaptured under 29 U.S.C. §1345." Heppenstall, 633 F.2d at 301.

The common law as to plan terminations and the legal effect of the plan termination date appear to be well settled prior to the decision of the Seventh Circuit in this matter. In the opinion of the District Court adopted by the Seventh Circuit [App. 1-4], the District Court states in a footnote "...[T]he PBGC's entitlement to summary judgment on the benefits issue does not depend on timing of the Plan termination, and the timing therefore is not a material fact as to that issue." App.9, footnote[1].

The District Court determined: "[T]he issue is whether the PBGC (and ultimately other employers in the industry) is obligated by law to step into the shoes of Continental and fulfill all of

Continental's unfunded promises. This Court finds no such obligation on the part of the PBGC with respect to the Special Payment." App. 21-22.

Apparently, the District Court did not look in the established law of Heppenstall and Broadway Maintenance, supra, cited in the Plaintiffs' briefs below, to find an obligation by the PBGC. If PBGC did not step into the shoes of the Plan Administrator, then why would the PBGC have the right to take the assets funding the Plan?

The scheme under statute and the common law in Heppenstall and Broadway Maintenance is plain. The PBGC takes over the assets and the obligations of the Plan and must seek the earliest possible plan termination date, in court or otherwise, to stop accrual of plan benefits. After the plan termination date, the plan benefits that accrue are

subject to analysis as to whether they are guaranteed by the PBGC pursuant to 29 U.S.C. §1322(a).

Under the common law articulated by the Seventh Circuit and the District Court here, the PBGC is free to appropriate the assets of the pension plan with no obligation to pay the accrued promises of the plan up to the date of termination. As here, the PBGC has no obligation to pay plan beneficiaries and no incentive to establish the earliest plan termination date if timeliness of termination is not a material fact. In fact, as here, there is no incentive to establish any plan termination date since the PBGC can stop benefit payments under the Plan retroactive to before the date of termination. Meanwhile, the Plan beneficiaries are free to write their Congressional representatives and die in a ditch from starvation while the PBGC

appropriates the assets of the pension plan in which they have interests. This constitutes a taking of property without due process of law prohibited by the Fifth Amendment of the Constitution of the United States.

The decisions of the Seventh Circuit and the District Court in this matter are in conflict with the decisions in other Circuits. The decisions of the Seventh Circuit and the District Court are far departures from the laws enacted by Congress and the common law articulated in other Circuits.

An opinion by this Court consistent with Heppenstall and Broadway Maintenance will make it clear that when the PBGC does step in to be appointed statutory trustee of an underfunded pension plan, and appropriates the assets funding the Plan, it has some obligations to Plan participants whose lifetime of work

made them eligible for the pension with Special Payment on February 24, 1986, payable from the Plan the day before PBGC terminated the Plan on February 25, 1986.

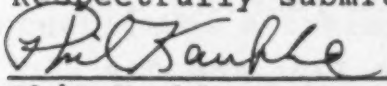
As it stands now, the PBGC is free within the jurisdiction of the Seventh Circuit to step in and appropriate the assets of a pension plan with no obligations to plan participants. An opinion by this Court would be a touchstone for the PBGC's dealings with plan participants of terminated plans, and a touchstone for the Circuit Courts as to the conflict that appears here.

PRECISE RELIEF REQUESTED

For the foregoing reasons demonstrating far departures from the laws of the United States, Kauble, et al, pray that petition for Writ of Certiorari shall issue and such other and further relief

as proper in the premises.

Respectfully submitted by:



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App. 1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604
Submitted July 26, 1996*

Decided August 14, 1996

Hon. Kenneth F. Ripple, Circuit Judge

Hon. Daniel A. Manion, Circuit Judge

Hon. Michael S. Kanne, Circuit Judge

PHIL KAUBLE,
Plaintiff-Appellant,

No. 95-1511

v.

PENSION BENEFIT GUARANTY CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis, Division

No. 93 C 1331
David F. Hamilton, Judge

ORDER

This Case represents yet another effort to revive claims arising out of the Continental Steel Corporation bankruptcy. When Continental shut down operations in 1986, the Pension Benefit Guaranty Corporation ("PBGC") terminated Continental's underfunded pension plan

and then took over the assets of the plan as statutory trustee. Under the plan termination insurance program set forth in Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA"), the PBGC guarantees payment of eligible pension benefits to plan participants. The PBGC determined that certain benefits due Continental's plan participants, however, were not "pension benefits" guaranteed under ERISA. Plaintiffs, 119 former employees of Continental Steel Corporation, unsuccessfully appealed this determination first before the PBGC Appeals Board and then the district court. One of these plaintiffs, Phil Kauble, now appeals pro se the district court's grant of summary judgment in favor of PBGC. For the reasons stated in the district court's order, we AFFIRM.

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* After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." See Fed. R. App. P. 34(a); Cir. R. 34(f). No such statement having been filed, the appeal is submitted on the briefs and the record.

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

JUDGMENT-WITHOUT ORAL ARGUMENT

Date: August 14, 1996

Before:

Hon. Kenneth F. Ripple, Circuit Judge

Hon. Daniel A. Manion, Circuit Judge

Hon. Michael S. Kanne, Circuit Judge

No. 95-1511

PHIL KAUBLE,
Plaintiff - Appellant

v.

PENSION BENEFIT
GUARANTY CORPORATION,
Defendant - Appellee

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis, Division
No. 93 C 1331, David F. Hamilton, Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

PHIL KAUBLE, ET AL.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	CAUSE NO.
	)	IP93-1331-C-H/G
	)	
PENSION BENEFIT	)	
GUARANTY CORPORATION,	)	
	)	
Defendant.	)	
	)	

ENTRY ON CROSS-MOTIONS FOR
SUMMARY JUDGMENT UPON JUDICIAL REVIEW

When Continental Steel Corporation ceased operations in 1986, the Pension Benefit Guaranty Corporation ("PBGC") terminated and took over Continental's underfunded pension plan. Under ERISA, the PBGC is responsible for guaranteeing payment of eligible benefits to Continental's plan participants. The PBGC has determined the benefits due to each of the Continental plan participants and has concluded that certain lump sum benefits originally promised by

Continental were not "pension benefits" guaranteed under ERISA. Former employees of Continental brought this action under ERISA against the PBGC primarily to force it to make good on their claims for those additional benefits. The PBGC and the plaintiffs have filed cross-motions for summary judgment. For the reasons set out below, the PBGC's motion for summary judgment is granted and the plaintiffs' motion for summary judgment is denied.

Undisputed Factual Background

The plaintiffs are 119 former employees of Continental Steel Corporation. The Plaintiffs are participants under an employee benefit plan established by Continental known as the Continental Steel Corporation 1950 Employee Pension Plan A ("the Plan"). The Plan was maintained pursuant to collective bargaining agreements between Continental

and the United Steelworkers of America Locals 1054 and 3601.

By the early 1980s, Continental was unable to meet the minimum funding requirements for the Plan imposed by ERISA. Continental sought and obtained waivers of ERISA's minimum funding requirement from the Internal Revenue Service for five consecutive years. As a result, the Plan became substantially underfunded. Continental's financial problems continued, and it finally filed a petition for reorganization under Chapter 11 of the Bankruptcy Code in November 1985 in the United States Bankruptcy Court for the Southern District of Indiana. Continental was unable to continue its operations, however, and shut down its facilities in early 1986. The bankruptcy proceeding was converted to a Chapter 7 liquidation.

On February 12, 1986, the PBGC issued a notice to Continental, to United Steelworkers Locals 1054 and 3601, and to counsel representing those entities, that it had determined that because the Plan had not met the minimum funding requirements, the possible long-run loss to the PBGC with respect to the Plan was expected to increase unreasonably if it were not terminated. The PBGC therefore sought appointment as statutory trustee of the Plan. Upon application to this Court for such appointment, the PBGC was referred to the Bankruptcy Court where the application was filed as an adversary proceeding in Continental's bankruptcy case.

On March 12, 1986, the Bankruptcy Court approved the termination of the Plan and appointed the PBGC as its statutory trustee. The court left the issue of the specific plan termination date for resol-

ution by the parties. On May 30, 1986, the PBGC sent notices to all participants of the Plan advising them that the Plan had been terminated and that the PBGC had been appointed trustee, but that a precise termination date had not been set.

In February 1988, a settlement was reached establishing February 25, 1986, as the Plan termination date.[1] On March

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[1] The plaintiffs have filed a Motion to Strike certain documents relating to the Settlement Agreement that was reached by the parties to the bankruptcy proceeding. They assert that the documents do not show that the Bankruptcy Court ever approved the settlement, which ostensibly would bear upon the date of the Plan termination. However, as shown below, the PBGC's entitlement to summary judgment on the benefits issue does not depend on the timing of the Plan termination, and the timing therefore is not a material fact as to that issue. The timing question is relevant only to the issue of notice and preferential treatment. The plaintiffs have voluntarily dismissed the notice issue, see note 2, below, and do not prevail on the preferential treatment issue even under their own construction of the timing question, see page 11, below. Therefore, plaintiffs' Motion to Strike is denied.

16 1988, the Bankruptcy Court authorized the bankruptcy trustee to execute the termination date settlement agreement, concluding the adversary proceeding. On or about July 15, 1992, the PBGC notified all Plan participants of its initial determination of their guaranteed benefit amounts. The plaintiffs here appealed that initial determination to the PBGC Appeals Board, which affirmed the initial determination.

On October 4, 1993 Plaintiffs filed this action. Their principal allegation is that they are entitled to a benefit called the "Special Payment" in the Plan. The PBGC found that the Special Payment was not a "pension benefit" and therefore was not guaranteed under ERISA. In their additional counts, the plaintiffs also claimed entitlement to notice of the proceedings to terminate the Plan, [2] entitlement to information regarding the

funding of the Plan from 1983 until its termination, an accounting of plan assets since 1983 (including a final report), and certain breaches of alleged fiduciary duties. The Appeals Board decided only the question of the plaintiffs' entitlement to benefits, finding the other claims brought here outside its jurisdiction. [3]

Standards of Review

With respect to the denial of benefits, this Court is reviewing a final agency decision and may set aside the agency action under the Administrative Procedures Act only if it is "arbitrary, capricious, an abuse of discretion, or other wise not in accordance with law." 5 U.S.C. §706(2)(A). Where, as here, the PBGC construes the provisions of ERISA in taking the action the plaintiffs complain about, this Court first determines whether the PBGC's construction is

contrary to clear congressional intent. See Pension Benefit Guaranty Corp. v. LTV Corp., 496 U.S. 633, 648 (1990). If that construction is not contrary to

---

[2] Plaintiffs have moved for voluntarily dismissal of their second cause of action, which alleged that the PBGC failed to provide them with sufficient notice of the proceedings to terminate the Plan.

[3] The lead plaintiff, Phil Kauble, has also filed an action against the United Steelworkers of America alleging reporting and disclosure violations under the Landrum-Griffin Act. That case is IP93-331-C-H/G and has also been decided this day on summary judgment. The Continental Steel litigation concerning the Plan (and other subjects) has been complex and voluminous. See, e.g., Ailor v. Pension Benefit Guaranty Corp., 7 F.3d 238 (Table), 1993 WL 384857 (7th Cir. 1993), cert. denied, 114 S.Ct. 1304 (1994); Anderson v. Wolford, 604 N.E.2d 659 (Ind. App. 1992); In re Continental Steel Corp., 968 F.2d 1218 (Table), 1992 WL 133897 (7th Cir. 1992), In re Continental Steel Corp. 966 F.2d 1218 (Table), 1992 WL 158865 (7th Cir. 1992), In re Continental Steel Corp., 966 F.2d 1456 (Table), 1992 WL 133897 (7th Cir. 1992); In re Continental Steel Corp., 966 F.2d 1456 (Table), 1992 WL 119259 (7th Cir. 1992); Kauble v. State Street Bank and Trust Co., 954 F.2d 726 (Table), 1992 WL 23489 (7th Cir. 1992).

clear congressional intent, the Court then determines whether the agency action is based on a permissible construction of the statute. Id. at 650.

With respect to the claims that the PBGC Appeals Board found outside its jurisdiction, this Court undertakes a normal summary judgment analysis. When confronted with a motion for summary judgment, the Court views the evidence in the light most favorable to the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). Summary judgment should be awarded if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue material fact and that the moving party is entitled to judgment a matter of law." Fed. R. Civ. P. 56(c); Liberty Lobby, 477 U.S. at 247. A genuine issue of material

fact exists if there is sufficient evidence for a jury or other trier of fact to return a verdict in favor of the non-moving party. Methodist Medical Center v. American Medical Security Inc., 38 F.3d 316, 319 (7th Cir.1994). "A material factual issue exists only if resolving the factual issue might affect the suit's outcome under the governing substantive law." Clifton v. Shafer, 969 F.2d, 278, 281 (7th Cir. 1992). "Irrelevant or unnecessary factual disputes do not preclude summary judgment." Id.

Benefit Claimed by Plaintiffs

Plaintiffs claim they are entitled to the Special Payment benefit. The Special Payment benefit is defined in Section 3.2 of the Plan as equal to 13 weeks of the participant's vacation pay, less the vacation pay received by the participant in the year of retirement. The payment

is to be made in a lump sum upon application for the benefit within three months following the month in which retirement occurs, but shall in no event be paid sooner than in the month after the month of retirement. The PBGC Appeals Board found that, because the Special Payment was to be paid in a lump sum distribution and did not provide a substantially level income to the participant over periodic payments, it was not a "pension benefit" as defined in 29 C.F.R. §2613.2, and therefore, was not guaranteed by the PBGC.

The operative provision of ERISA governing benefits guaranteed by the PBGC is 29 U.S.C. §1322(a), which provides:

> Subject to the limitations contained in subsection (b), the [PBGC] shall guarantee ... the payment of all nonforfeitable benefits ... under a single-employer plan which terminates at a time when this title applies to it.

Subsection (b) contains a limitation

which states:

> The amount of monthly benefits described in subsection (a) ... provided by a plan, which are guaranteed under this section with respect to a participant, shall not have an actuarial value which exceeds the actuarial value of a monthly benefit in the form of a life annuity commencing at age 65 equal to the lesser of [either amount provided in the statute].

29 U.S.C. §1322(b)(3).

The PBGC has promulgated regulations, found at 29 C.F.R. §§2613.1 through 2613.8 (1994), to implement 29 U.S.C. §1322. The regulations provide that to be guaranteed, a benefit must be a "pension benefit". 29 C.F.R. §2613.3. A pension benefit must be payable to a former employee as an annuity, and must provide the participant with a substantially level income. 29 C.F.R. §2613.2. An annuity must provide "a series of periodic payments to a participant or surviving beneficiary for a fixed or contingent period." Id.

Congress did not precisely define by statute which benefits are guaranteed under ERISA. Congress instructed the PBGC to guarantee "all nonforfeitable benefits ... under a single employer plan .." 29 U.S.C. §1322(a) (emphasis added). Because Congress left the specific definition of such benefits to the PBGC, the PBGC regulations defining guaranteed benefits are not contrary to the express intent of Congress in enacting the legislation. Under PBGC v. LTV. Corp., the question then becomes whether the regulations, in their application here, are a permissible construction of the statute. 496 U.S. at 650.

Not all employee benefits are guaranteed and Congress gave the PBGC some policy-making discretion in determining which benefits under an employee benefit plan are "pension benefits", such that they are guaranteed up to a statutory cap, [4]

and which benefits are "something else" and not guaranteed. Welfare benefits, such as health insurance benefits, are not guaranteed, for example. West v. Grayhound Corp., 813 F.2d 951, 954 (9th Cir. 1987). Further, in view of the purposes of ERISA, one hesitates to think that the PBGC and the other employers who fund its guarantees would be responsible for paying lump sum severance benefits such as "golden parachute" or "tin parachute" payments, even if part of an employee benefit plan. Cf. Sutton v. Weirton Steel Division of National Steel Corp., 724 F.2d 406, 410 (4th Cir. 1983) ("The accrued benefits secured by ERISA

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[4] Under 29 U.S.C. §1322(b)(3) and 29 C.F.R. §2613.4, even if a benefit is a "pension benefit" as provided in the regulations, it may not be guaranteed in full by the PBGC if the total benefit amount exceeds a participant's benefit entitlement, payable as a straight life annuity, at the participant's normal retirement age. Thus, the amount of the benefit guarantee is capped.

do not encompass unfunded, contingent early retirement benefits or severance payments").

The purpose of the statute, as set out in 29 U.S.C. §1302(a)(1-3), are (1) to encourage continuation and maintenance of voluntary private pension plans, (2) to provide for timely and uninterrupted payments, and (3) to maintain premiums at the lowest level consistent with the aims of the Act.

The PBGC's regulations limit guaranteed benefits to those made in periodic, level payments are consistent with the stated purpose of ERISA. The Special Payment is a lump sum benefit that does not meet the requirements of the regulations. That is not to say that all lump sum distributions are not guaranteed, however. For example, if the benefit is calculated by reference to the annuity principles set out in the regulations,

but its payment may be elected in a lump sum distribution, such a benefit may be guaranteed by the Act and regulations. See 29 C.F.R. §2613.8. The Special Payment under this Plan, however, is calculated by reference to vacation time accrued and is payable only in a lump sum. This difference in treatment is consistent with the purpose of ERISA, which include protecting pensions designed to provide retirement income, while keeping premiums reasonably low. Lump sum payments like the Special Payment here appear to be "extra" since they do not serve the core purpose of maintaining a beneficiary's income level over time, as would periodic and substantially level payments. Moreover, 29 U.S.C. §1322(b)(3) contemplates a periodic calculation to determine the guarantee caps, a method in accord with the annuity principles used to define the

pension benefit. Therefore, the PBGC's regulations requiring most guaranteed payments to be periodic and for the purpose of providing a level income are permissible under ERISA in light of the purposes of the Act.

Contrary to the plaintiffs' repeated assertions, the issue here is not whether the Plan promised them the Special Payment or whether the Plan was terminated at a time and in a manner that triggered their right to the Special Payment under the Plan. The Plan clearly did make that promise, and for purposes of these motions, the Court assumes the Plan was terminated so that the plaintiffs would have a right under the Plan to receive the Special Payment. The problem is that Continental, the employer who made that promise to these plaintiffs, is now bankrupt and unable to fulfill the promise. The issue is whether

the PBGC (and ultimately other employers in the industry) is obliged by law to step into the shoes of Continental and fulfill all of Continental's unfunded promises. This Court finds no such obligation on the part of the PBGC with respect to the Special Payment.

Plaintiffs' Other Claims

The plaintiffs made only a vague reference to another benefit, the Increased Pension benefit, in ¶ 23 of the Third Cause of Action in their Complaint. The plaintiffs have not briefed the issue of their entitlement to the Increased Pension benefit in any of the memoranda in response to the PBGC's Motion for Summary Judgment or in support of their own motion. The PBGC, on the other hand, has fully briefed the issue with adequate factual support and is entitled to summary judgment on that claim for the reasons stated by the PBGC. The guarantee

caps set out in 20 C.F.R. §2613.4 preclude the plaintiffs' entitlement to the Increased Pension benefit -- with the exception of four plaintiffs who were already awarded the benefit by the Appeals Board -- and the regulation is permissible in light of 29 U.S.C. §1322 (b)(3).

In their Fourth Cause of Action, the plaintiffs claim that the PBGC has unlawfully denied them information regarding a diminution in Plan assets from 1983 until February 25, 1986 (the date of Plan termination). The Plaintiffs assert that under 29 U.S.C. §1342(d) and 11 U.S.C. §704(7), the PBGC has a duty to provide such information. They are correct that §1342(d)(3) of Title 29 and §704(7) of Title 11, when read in conjunction, establish that the PBGC, as a trustee of the Plan, has a duty to furnish information regarding the estate

to parties in interest. As the PBGC correctly points out, however, it was not appointed trustee until February 25, 1986 and thus had no duty to account for Plan assets before that time. In addition, there should be no surprise to the plaintiffs that the Plan became underfunded. It was not a secret that Continental did not make contributions to the Plan during the time in question, having received waivers from the IRS. [5]

The plaintiffs also allege in their Fifth Cause of Action that the PBGC failed to provide a final report and final accounting of Plan assets as required by 29 U.S.C. §1342(d)(3) and 11 U.S.C. §704(9). The plaintiffs argue that the PBGC is reluctant to provide a report and accounting because of an alleged shortfall of $18 million in Plan assets. However, the plaintiffs' allegations of the loss of Plan assets rests on no

ground other than conduct that occurred prior to the PBGC's appointment as trustee. Moreover, the PBGC did in fact complete a final accounting in a memorandum dated September 30, 1991, the results of which were transmitted to all Plan participants via the July 15, 1992, initial determination letters.

Finally, the plaintiffs make cryptic allegations in their sixth and seventh causes of action that the PBGC breached fiduciary duties owed them. The plaintiffs' briefing with regard to their Sixth Cause of Action alleges the false reporting of Plan assets in 1983 by State

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[5] While unclear, it is possible that the plaintiffs complain of post-termination changes in the Plan assets as well. The PBGC correctly points out that increases or decreases in post-termination Plan assets are statutorily borne by (or credited to) the PBGC as an agency of the government and not as a plan trustee; thus, the amount of benefits that the PBGC guarantees will not change and the amount of benefits participants receive will not change.

Street Bank, the Plan trustee before the PBGC took over. Again, the PBGC owed no fiduciary duties to the plaintiffs until February 25, 1986. In their Seventh Cause of Action, the plaintiffs allege that the President of Local 1054, United Steelworkers of America, William E. Collins, was granted preferential treatment in that he, as a participant of the Plan, received the Special Payment after the PBGC became trustee. This Court need not address the legal implications of such an event, since the PBGC correctly points out that the plaintiffs specifically admitted in their brief to the PBGC Appeals Board that Collins had retired officially on January 31, 1986, before the PBGC became Plan trustee. In sum, there is no evidence that the PBGC breached any fiduciary duties to the plaintiffs after February 25, 1986, the first date upon which the PBGC could have

owed them any such duties.

Notice to Plaintiffs

On August 25, 1994, the plaintiffs in this action began proceeding pro se upon the withdrawal of their attorney, Donald Mark Garringer. Garringer was forced to withdraw because he was suspended from practicing before courts in the Southern District of Indiana. At the date of this Entry, Garringer remains suspended by this Court and by the Indiana Supreme Court,[6] and has been removed from the roll of attorneys admitted to practice before the United States Court of Appeals for the Seventh Circuit.[7]

In view of the pro se status of the plaintiffs, and the unfortunate example their former attorney has provided, the Court advises the plaintiffs to seek counsel of an attorney admitted to practice before the Seventh Circuit if they choose to appeal this decision. The

plaintiffs may, of course, choose to proceed pro se on appeal, but they should be aware of the possibility of monetary sanction under Rule 38 of the Federal Rules of Appellate Procedure if their appeal is deemed frivolous. See Farnum v. United States, 813 F.2d 114, 116 (7th Cir. 1987)(pro se litigants not immune from sanction; district court should inform pro se litigants of possibility of sanction under Rule 38).

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[6] See In re Garringer, N.E.2d 809 (Ind. 1994)(60-day suspension). The Clerk of the Indiana Supreme Courts confirms that Garringer has not received reinstatement.

[7] See Ailor v. Pension Benefit Guaranty Corp., 7 F.3d 238 (Table, 1993 WL 384857 at *5 n.2 (7th Cir. 1993).

Conclusion

As applied in this case, the regulations promulgated by the PBGC to define which benefits are guaranteed under ERISA are not inconsistent with the language and purpose of the statute. The PBGC properly applied those regulations in refusing to guarantee payment of the Special Payment benefit under the Plan at issue here. The plaintiffs' claims of the PBGC's failure to provide financial information, failure to provide an accounting, and breach of fiduciary duties fail because it is undisputed that the time period for which the plaintiffs seek to hold the PBGC accountable for such duties and the provision of such information was before the PBGC became trustee of the Plan. The PBGC's administrative denial of benefits is AFFIRMED and summary judgment on the claim is GRANTED. The PBGC's motion for

summary judgment is GRANTED with respect to the remaining causes of action, and the plaintiffs' motion for summary judgment is DENIED. Final judgment will be entered.

Date: December 27, 1994

David F. Hamilton, Judge
United States District Court
Southern District of Indiana